No. 16,250

IN THE

United States Court of Appeals

For the Ninth Circuit

BERNARD G. HOUSE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

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JURISDICTION.

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291 and 1292 prior to the amendments appearing in Public Law No. 85-508 72 Stat. 339.

COUNTERSTATEMENT OF THE CASE.

At approximately 6:00 A.M. on May 21, 1957, appellant, Bernard G. House, entered the Esquire Club (TR 282, 283, 338) which is located about one-half mile south of the City of Fairbanks, Alaska (TR 117). The Esquire Club was owned and operated by Jack Perry (the victim) and his partner, Eva Beree (TR 132, 452).

Upon entering the Esquire Club, House met Dean Scott, a good friend whom he had known for approximately five years (TR 281). Thereafter, Scott and House started rolling dice for drinks and at the same time making side bets (TR 283, 339). About an hour and one-half after House entered the Esquire Club (TR 283) he had lost all his money (TR 339, 367, 418), so he proceeded to his apartment to obtain additional funds (TR 284, 339, 418). Upon his return the dice game resumed (TR 284).

At approximately 8:00 A.M. on May 21, 1957, George C. Murray and two of his friends entered the Esquire Club (TR 117, 118), and sat at the bar about four stools away from House and Scott, talking with Jack Perry (the victim) (TR 118, 119). In the meantime House and Scott started arguing wherein House accused Scott of cheating (TR 119). Thereupon, Perry walked down to House and Scott and told them that there was to be no cheating or gambling in his place and "either sit down and drink or get out." (TR 119, 188, 476). House started arguing with Perry and he again told him to either sit down and drink or get out

(TR 119). Perry then pulled a pistol and started waving it in front of House telling him again to get out or sit down and drink (TR 119). Then House said, "Don't point that pistol at me" (TR 119). "I'll get your ass" (TR 119). "I will get it today or tomorrow" (TR 119, 188, 199). "I'll get you" (TR 119). He then left the Esquire Club and Perry bolted the door from the inside (TR 288, 301, 315, 370). There is conflicting testimony that prior to House being locked out of the Esquire Club, that Perry snapped the trigger of the pistol while waving it in House's direction (TR 147-150, 238, 287, 314, 315, 369, 409, 421). There is also conflicting testimony that when House left the Esquire Club, Perry refused to let him retrieve his money which was lying on the bar (TR 150, 151, 288, 315, 421).

In a few seconds or a minute House returned and kicked on the door (TR 119, 299, 402, 422). Perry yelled, "Don't let him in" (TR 119, 203, 316, 325). Someone unbolted the door and House came running into the Esquire Club (TR 299) with a 12-gauge shotgun (TR 120, 299) and stated, "Now I got you, you son-of-a-bitch" (TR 120, 188, 189, 465). "You just sold me your ass" (TR 465). As House rushed into the Esquire Club, Perry was standing behind the bar facing away from the door (TR 120, 155). The government's witnesses are positive that Perry did not have a pistol in his hand when House came running in with his shotgun (TR 120, 121, 154, 155, 205, 206, 209, 210). As Perry tried to duck under the bar, House raised his shotgun to his shoulder (TR 206) and shot

him in the back (TR 120, 301). In the words of House the shooting took place as follows: "When I raised the shotgun he made a movement to get down behind the beer cooler." "When he turned sideways, it was a matter of a flashing second, I pulled the trigger. It caught him, I guess, in the side" (TR 423, 424). House continued by saying: "I didn't intend to kill the man" (TR 423). "I intended to disarm him if he had the gun on him and at least turn him over to the law or at least turn him over to somebody" (TR 423). As Perry fell to the floor, Murray ran behind the bar and saw him reaching in his right hip pocket trying to pull his pistol out (TR 120, 121, 157, 158). Murray then told Perry that he (Perry) was shot and took the pistol out of Perry's right hip pocket and "slung" it on the floor (TR 120, 121, 159), the pistol came to rest about three feet away (TR 229). Murray proceeded outside, by then House had moved his car to the middle of the street at which time Murray told him, "I think you ought to come back. You just shot a man. You can probably get in a lot of trouble by taking off" (TR 122). House then returned to the Esquire Club (TR 122, 129).

After witnessing the shooting, Lawrence W. Bales went outside and stopped a passing automobile and requested the driver to summon the police (TR 190, 207, 208). Bales stated that, thereafter the Alaska Territorial Police arrived in less than five minutes (TR 190).

Sgt. Young of the Alaska Territorial Police was the first officer to arrive at the scene of the shooting (TR

227). Upon entering the Esquire Club, Sgt. Young asked House where the wounded man was and House replied: "You finally got me" (TR 227, 228, 429).

At approximately 9:15 A.M. Officer Barkley of the Alaska Territorial Police arrived at the Esquire Club (TR 237). As he entered the Esquire Club, House stated: "Well, Barkley, you have been after me a long time. You've got me now" (TR 237). Barkley then said, "What happened, Johnny?" House replied, "I shot the son-of-a-bitch" (TR 237). House was then arrested (TR 237).

About the time Officer Barkley came the ambulance also arrived and Perry was removed (TR 230, 231) to St. Joseph's Hospital, where he was examined and treated by Doctor Kenneth R. Kaisch, a physician and surgeon (TR 107-109). Dr. Kaisch described the shotgun wound as being approximately four inches in diameter having been inflicted on the left side of Perry's back (TR 109, 172). Dr. Kaisch testified that Perry would have to be bending down (TR 110) or the assailant would have to be standing above him in order to get the angle of the wound (TR 110, 111). Dr. Kaisch treated Perry upon his arrival at St. Joseph's Hospital on May 21, 1957, and until Perry expired at approximately 9:30 P.M. on May 27, 1957 (TR 109, 110).

Dr. Paul B. Haggland, a physician and surgeon, performed an autopsy on Jack Perry (TR 168), and in his opinion the cause of death was the gunshot wound in his back which destroyed about two inches of the spinal cord (TR 171).

On November 7, 1957, the Grand Jury for the Fourth Judicial Division, District of Alaska, returned an Indictment charging Bernard G. House aka Johnny House with the crime of First Degree Murder in violation of Section 65-4-1 of the Alaska Compiled Laws Annotated, 1949.

On May 5, 1958, the appellant, Bernard G. House aka Johnny House went on trial before a jury, which on May 9, 1958, returned a verdict of guilty of murder in the first degree.

The appellant was sentenced to life imprisonment.

A motion for a new trial was denied and an appeal was taken to this Honorable Court.

QUESTIONS PRESENTED.

Whether the Court committed error in giving Instruction No. 12.

Whether the Court's instructions distinguished between murder in the first degree and murder in the second degree.

Whether the Court committed error in giving Instruction No. 15.

Whether the Court committed prejudicial error in not giving defendant's proposed Instructions Nos. 3, 4, 5, 6, 11 and 12.

ARGUMENT.

I

THE COURT DID NOT ERR IN GIVING INSTRUCTION NO. 12.

So that a proper analysis can be made in determining whether the Court committed error in giving Instruction No. 12, it is necessary to consider the evidence before the Court.

Jack Perry, the part owner of the Esquire Club, had ordered the appellant to leave the establishment. Although there is a conflict in the testimony as to whether Jack Perry presented a firearm the first time he told the appellant that there was to be no cheating or gambling in his place and either sit down or get out (TR 119, 188, 476), the evidence discloses that he did assault the appellant with the 380 Llama automatic the second time. After the appellant left the club, Jack Perry went to the door and locked it and placed the weapon in his pocket. When the appellant returned after securing the loaded shotgun from his automobile and kicked on the door, the deceased shouted, "Don't let him in." Witnesses appearing for the defense as well as those for the government established this fact; therefore, Jack Perry, who was originally the aggressor or had used excessive force in ejecting the appellant, had withdrawn from the affray.

Three witnesses for the government testified that the appellant had threatened, in effect, to kill Perry as he was leaving the premises (TR 119, 188, 199).

The appellant testified that when he re-entered the front door he intended to disarm the deceased and at

least turn him over to the law (TR 421-423). The appellant never claimed he also returned for the purpose of getting the money which had been lying on the bar where he and Scott had been gambling (TR 277).

Appellant did testify, "Anyway, he tried to get down behind that beer cooler. When he turned sideways, it was a matter of a flashing second, I pulled the trigger" (TR 424). Doctor Haggland testified that the deceased was shot in the back (TR 172). See Plaintiff's Exhibit "A".

The evidence discloses the only statements made by the appellant after he re-entered the club and before the shooting were, "Now I got you, you son-of-a-bitch," or words to that effect (TR 120, 188, 189, 465). Just prior to his arrest, House told the Territorial Police officer that he shot the son-of-a-bitch (TR 237).

Most assuredly the defendant had a right to have his theory of the case presented to the jury.

However, the testimony of the defendant clearly set out his defense when he stated that, ". . . I intended to disarm him if he had the gun on him and at least turn him over to the law or at least turn him over to somebody, . . ." (TR 423). The Court in Instruction No. 12 clearly set out this defense by stating as follows:

> ". . . But, if the defendant returned merely to disarm the deceased or to make a citizen's arrest, and he carried the shotgun merely for his own protection or to carry out the disarming of the deceased or to make the arrest, and he actually shot the deceased in self-defense, as defined in these in-

structions, you must find the defendant not guilty . . ."

The Court further instructed:

". . . On the other hand, if you are convinced by the evidence beyond a reasonable doubt that the defendant reentered the Esquire Club with the intention of shooting the deceased, you cannot find that he shot in 'self-defense.' This means that the rule of self-defense does not authorize one to seek revenge or take into his own hands the punishment of an offender."

Considering all the evidence in the case, this part of the Court's instruction was a correct statement of the law. After the appellant left the club he was free from danger and if he went back into the premises for the purpose of shooting Jack Perry then he was the aggressor and he could not rely on self-defense to justify the killing. *Laney v. United States,* 294 F. 412 (D. C. Cir. 1923).

The Supreme Court of the United States recognized this qualified right of self-defense in *Addington v. United States,* 165 U.S. 184, 187 (1897).

". . . On the contrary, the court said, in substance, that if the circumstances were such as to produce upon the mind of Addington, as a reasonably prudent man, the impression that he could save his own life, or protect himself from serious bodily harm, only by taking the life of his assailant, he was justified by the law in resorting to such means, *unless he went to where the deceased was for the purpose of provoking a difficulty in order that he might slay his adversary. In so instruct-*

ing the jury no error was committed." (Emphasis supplied.)

The Court again in *Andersen v. United States,* 170 U.S. 481, 508, 509 (1898) stated:

"It is true that a homicide committed in actual defence of life or limb is excusable if it appear that the slayer was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from the deceased, and that his act in causing death was necessary in order to avoid the death or great bodily harm which was apparently imminent. But where there is manifestly no adequate or reasonable ground for such belief, or the slayer brings on the difficulty for the purpose of killing the deceased, or violation of law on his part is the reason of his expectation of an attack, the plea of self defence cannot avail. *Wallace v. United States,* 162 U. S. 466; *Allen v. United States,* 164 U. S. 492; *Addington v. United States,* 165 U. S. 184.

According to his own statement, Andersen, after he had shot the captain, thought about the mate, armed himself with the captain's pistols, went in search of his victim, and finding him aloft on the mainmast at work, called him down, or, seeing him coming down, awaited him, and shot him. He was not only the aggressor but the premeditated aggressor. . . ."

"We are not insensible to the suggestion that persons confined to the narrow limits of a small vessel, alone upon the sea, are placed in a situation where brutal conduct on the part of their superiors, from which there is then no possible escape, may possess special circumstances of aggravation.

But that does not furnish ground for the particular sufferer from such conduct to take the law into his own hands, nor for the suspension of those general rules intended for the protection of all alike on land or sea.''

In *McDaniels v. Commonwealth,* 249 S.W. 2d 546 (Ky. 1952):

'' 'Although the jury may believe that the defendant, McKinley McDaniels shot and killed the deceased, George Hammons, either as set out and defined in Instruction No. 1 above, or as set out and defined in Instruction No. 2 above, yet if the jury shall believe from the evidence that at the time he did so, he believed and had reasonable grounds to believe that either he or his wife were then and there in danger of death or the infliction of some great bodily harm at the hands of George Hammons, and that it was necessary, or appeared to him, in the exercise of reasonable judgment, to be necessary, for him to shoot, wound and kill the deceased, George Hammons, in order to avert that danger, real, or to him reasonably apparent, then the jury should find the defendant not guilty, upon the ground of self-defense, or defense of his wife, or apparent necessity therefor.

'However, this instruction is subject to the following qualifications: If the jury shall believe from the evidence beyond a reasonable doubt that the defendant, McKinley McDaniels, brought on the difficulty in which the said George Hammons was shot, wounded and killed by leaving the premises mentioned in the evidence, and later returned to the premises with his rifle, when it was not necessary, and when the defendant had no reasonable

grounds to believe it necessary to protect himself or his wife from immediate danger of the infliction on him or her of death or great bodily harm, or which reasonably appeared to him about to be inflicted on him or his wife by the said Hammons, and that the defendant thereby brought on such danger to himself, if they believe from the evidence that any such danger existed, then, in that event, the jury cannot acquit the defendant upon the ground of self-defense, or apparent necessity therefor.' "

"He insists that the second literary paragraph of that instruction was erroneous and should not have been given because the evidence showed that Hammons was the aggressor who fired the first three shots. It is true that Hammons was the aggressor during the original incident, but the question to be determined by the jury here was whether or not appellant shot in self-defense during the second engagement. It may be that decedent himself shot in self-defense when he saw appellant go to the house, arm himself, and return. It was proper for the court to submit the question of whether McDaniels brought on the difficulty when the manner by which the difficulty was precipitated is described . . ."

The Court further commented:

"We think that this instruction fairly stated the law. The law of self-defense is a law of necessity. In the absence of a need to defend, the principle should not be applied. After appellant reached a place of safety, when there was no need to return, and he, thereupon, armed himself and returned, he should not be given the advantage of an un-

qualified self-defense instruction. With a qualified instruction which described the circumstances, the jury was able to decide whether appellant's return was stimulated by necessity or fury."

Counsel also insisted that the self-defense instruction should have been qualified by one that embraced this idea:

"'In the event the jury believes from the evidence that appellant, in good faith, believed and had reasonable grounds to believe that the deceased Hammons had abandoned the difficulty, after meeting his wife, proceeded with such good faith belief in his mind, for the purpose of retrieving his tools and then the deceased Hammons returned to the scene and began firing at the defendant, the defendant had the right to defend himself and use such means at his command so to do, even to this the taking of the life of the deceased and in that event, the jury should acquit the defendant.'

There was no intimation in the record that the tools were in danger of being stolen or that appellant was acting in defense of his property, and such an instruction omits entirely the essence of the requirement that the plea of self-defense is forfeited by aggression of the accused; presents the converse of the question of whether appellant abandoned the scene and brought on the difficulty by returning; ignores the question of whether McDaniels fired under the apparent necessity of averting harm to himself or his wife; turns the decision of the jury solely upon the 'good faith belief' in appellant's mind, and is, we believe, improper."

In *People v. Walters,* 194 N.W. 538, 540 (Mich. 1923):

> " 'A killing is not justifiable on the ground of self-defense if the defendant, after a difficulty between the deceased and himself had terminated, or after he had had an opportunity to decline combat, continued the struggle or renewed the affray, the result of which was the homicide; and that is the rule, irrespective of who was at fault in the original encounter. The defendant fails to make out a case of self-defense where the evidence shows he renewed a difficulty after the deceased abandoned it.' "

Woodward v. State, 177 So. 531 (Miss. 1937);
Lewis v. State, 195 So. 325 (Miss. 1940);
State v. Shepherd, 17 S.E. 2d 469 (N. C. 1941);
People v. Burns, 149 Pac. 605, 610 (Calif. 1915);
State v. Meyers, 125 P. 2d 441 (Ariz. 1942).

Although the facts are not identical, they are not so dissimilar that the rule of law stated in *Johnson v. Commonwealth,* 147 SW 2d 1048, 1051 (Ky. 1941) cannot be cited in support of the Court's instruction, wherein the opinion read:

> ". . . As he approached deceased his pistol was then drawn and his actions and words were such as to clearly indicate to the deceased that he was in great danger. So that, even if deceased had then endeavored to draw his double-barrelled shotgun on appellant the latter was responsible therefor, since he created the situation justifying deceased in doing so. Therefore, the case clearly and most manifestly comes within the rule—so often

> declared by this and other courts and denied by none—that one may not shelter under his right of self-defense when he himself brought on the immediate difficulty in which the alleged danger to himself occurred, and that though accused might have availed himself of the right of that defense if he had acted earlier in the melee, yet if his antagonist abandoned that immediate difficulty and was later attacked by defendant in circumstances authorizing the deceased to himself become the aggressor in exercising his right of self-defense, then the crime committed by defendant may not be justified under his like right."

The jury had sufficient evidence from which they may well have found that the appellant, after he had been ejected from the club, returned to the scene of the former assault by Perry, armed and in search of the deceased and with the intention of shooting him. Therefore, the appellant could not claim to have acted in self defense. *State v. Clay,* 210 N.W. 904, 905 (Iowa 1926).

Counsel for appellant in his brief cites *Thompson v. United States,* 155 U.S. 271 (1894) which can be distinguished from the present case on the facts as stated in the opinion as follows:

> "He further states that he rode on to Checotah's, where he left the bundle; that he got to thinking about what Sam Haynes had told him as to the threats that Hermes had made, and as there was no other road for him to return home by, except the one alongside of the field, he thought it was best for him to arm himself so that he could make a defence in case he was attacked; . . ."

In our case, appellant was not required by his position to re-enter the club, especially in view of the fact that he was confronted by a bolted door and found it necessary to kick at the door to gain entry.

Trial counsel objected to the instruction on the grounds that he believed the defendant would still have the right of self-defense even if he re-entered the club for an improper motive; if he were then placed in a position where he could reasonably anticipate death or great bodily harm. The law previously cited to the Court in this brief does not support his theory.

Nor was the instruction a mandate to find against the defendant on the issue of self-defense as now urged on appeal.

It is also argued that the Court committed error when it instructed that, "The assault with a dangerous weapon made upon the defendant by the deceased before the defendant left the Esquire Club had ended", because the Court invaded the province of the jury. The Court made this determination as a matter of law, as all the witnesses had agreed that the defendant left the club and the door was then locked. Trial counsel recognized the fact that the first assault had ended where he stated, "Your Honor, commenting on the longer of the two instructions, there is evidence really here of two assaults with a deadly weapon by the deceased, the first being practically uncontradicted by all the witnesses as to the incident before leaving the club. If certain witnesses are to be believed, as the defendant re-entered the club, the deceased again in effect assaulted him with a deadly weapon, because the pistol

was pointed at him as he entered the door. I was wondering whether in that first paragraph—it is quite clear to me that your Honor is referring to the first assault because 'justify the defendant in re-entering the Esquire Club,' that is probably clear enough" (TR 481, 482).

A federal trial judge has the right to sum up and comment on the evidence. *Shaw v. United States,* 244 F. 2d 930, 939 (9th Cir. 1957).

II

WHEN INSTRUCTIONS NO. 4 AND NO. 5 ARE CONSIDERED TOGETHER, THERE IS A PROPER DISTINCTION BETWEEN FIRST DEGREE AND SECOND DEGREE MURDER.

The Court's Instructions No. 4 and No. 5 distinguished for the jury the difference between first and second degree murder.

Instruction No. 4 provided:

> ". . . To deliberate means to take into consideration, to ponder and to weigh, although not necessarily prudently or wisely, such reasons for or against a proposed action as come to the mind of a person contemplating the action and whose capacity to exercise judgment has not been destroyed by emotion or passion.
>
> To premeditate a certain action means to think about such action before doing it, so that one reaches a positive decision to take the action and conceives a plan or method by which he will undertake to achieve the intended result."

Instruction No. 5:

"To constitute murder in the first degree, the killing must be accompanied by a clear, deliberate intent to take life. The intent to kill must be the result of deliberation and must have been formed upon a pre-existing reflection and not under a sudden heat of passion or other condition such as precludes the idea of deliberation. The law does not require as an essential element of murder in the first degree that a prescribed or standardized amount of time be used in the deliberation or elapse between the formation of the intent to kill and the act of killing. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder in the first degree."

This instruction did not state that there need be no appreciable length of time between the formation of the intent to kill and the killing itself; it may be as instantaneous as successive thought which was so objectionable in *Jones v. United States,* 175 F. 2d 544 (9th Cir. 1949), but exactly the opposite that the true test is not the duration of time, but rather the extent of the reflection and the intent to kill must be the result of deliberation and must have been formed upon a pre-existing reflection. The jury was told that to premeditate means to think about it, before doing it,

so that one reaches a positive decision to take the action and conceives a plan or method, which was approved in *Fisher v. United States,* 328 U. S. 463 (1945).

Instruction No. 5 was not objected to by counsel and even if the Court chooses to consider it under the plain error rule, the instructions considered together meet the standard required.

III

THE COURT DID NOT COMMIT PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 15.

Instruction No. 15 reads as follows:

> "Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.
>
> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

> In determining the issues as to intent, the jury are entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind."

Trial counsel said, ". . . the only exception I take to the instruction is that on this question of intent the instruction fails to include the testimony of the defendant and I was going to suggest that the very last paragraph at the end of the instruction, in the last sentence, a comma be placed, and the words 'including the testimony of the defendant' be added."

> "The Court. I must be looking at the wrong place. Is that No. 15?
>
> Mr. Kay. Yes, sir, as to proof of intent.
>
> The Court. I think that is included but not specifically.
>
> Mr. Kay. I think undoubtedly it is, too, Your Honor . . ." (TR 492, 493).

It is difficult to see how this can be considered an objection as required by Rule 30 of the Federal Rules of Criminal Procedure.

The lower Court in *Allen v. United States,* 164 U.S. 492, 496 (1896) instructed in a murder case where self-defense was an issue and eye-witnesses gave testimony that:

> " 'The law says we have no power to ascertain the certain condition of a man's mind. The best we can do is to infer it more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act which it is known will produce a particular result is

from our common experience presumed to have anticipated that result and to have intended it. Therefore we have a right to say, and the law says, that when a homicide is committed by weapons indicating design that it is not necessary to prove that such design existed for any definite period before the fatal bullet was fired. From the very fact of a blow being struck, from the very fact that a fatal bullet was fired, we have the right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant.' "

The Supreme Court of the United States stated:

"This is nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act."

In *Agnew v. United States,* 165 U.S. 36, 59 (1897), the Supreme Court in analyzing the lower Court's instruction stated:

"This was in application of the presumption that a person intends the natural and probable consequences of acts intentionally done, and that an unlawful act implies an unlawful intent. 1 Greenl. Ev. §18; 3 Greenl. Ev. §§13, 14; Jones on Ev. §23; Bishop Cr. Proc. §§1100, 1101; and cases cited.

The Circuit Court, however, told the jury that the presumption of the intent to injure and defraud, if the facts were found as stated, was not conclusive, but, in substance, that its strength was such that it could only be overcome by evidence that created a reasonable doubt of its correctness; in

other words, that as the presumption put the intent beyond reasonable doubt, it must prevail, unless evidenec of at least equivalent weight were adduced to the contrary.

The question of the particular intent was not treated as a question of law, but as a question to be submitted to the jury, and conceding that the statement of the court that the evidence to overcome the presumption must be sufficiently strong to satisfy the jury 'beyond a reasonable doubt' was open to objection for want of accuracy, we are unable to perceive that this could have tended to prejudice the defendant when the charge is considered as a whole."

Just as in the *Agnew* case Instruction No. 15 did not treat the question of intent as a matter of law, but as a question of fact for the jury to determine.

The important words in this instruction which distinguish this case from those cited by appellant are, "*so unless the contrary appears from the evidence,* the jury may draw the inference . . ." (Emphasis supplied.)

In Instruction No. 29, the jurors were advised:

"If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instructions, and ignore the others, but you are to consider all the instructions as a whole, and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance."

The jury was also told that intent was an essential element of the crime and it was to be determined by the jury from consideration of all the facts and circumstances in evidence. The Court further instructed the jury that the burden of proving every fact material and necessary to a conviction by competent evidence beyond a reasonable doubt is on the government and does not at any time or under any circumstances shift from the government. As stated by this Court in *Bateman v. United States,* 212 F. 2d 61, 70 (9th Cir. 1954), ". . . Counsel has singled out one instruction in claiming error without regard to the instructions considered as a whole." *Legatos v. United States,* 222 F. 678, 687 (9th Cir. 1955).

In *Rosenbloom v. United States,* 259 F. 2d 500, 503 (8th Cir. 1958) where the lower Court's instruction, that was objected to on the ground that specific intent may not be presumed but must be proven, stated in part, "The presumption is that a person intends the natural consequences of his act, and the natural presumption would be that if a person knowingly or intentionally did not report all of his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax on the unreported income."

The Court also in its opinion cited *Grayson v. United States,* 107 F. 2d 367, 370 where the trial court had instructed the jury that the defendant was presumed to intend the natural consequence of her acts. "It was urged that this invaded the province of the jury in that it raised a conclusive presumption of intent. Answering this contention this Court said:

> 'There is, of course, no presumption of law to that effect. (Citing cases.) The use of the words "presume" or "presumption" in this connection is not to be approved. No doubt inferences as to intent may be gathered from subsequent acts and conduct, but no presumption of law follows to invade and restrict the province of the jury. However, we do not think the language employed had that effect in the instant case. The question of the particular intent was not treated as a question of law, but as a matter to be submitted to and resolved by the jury. The charge as a whole must be considered. In this same paragraph the jurors are admonished that they would be justified in finding the intent only from all the evidence in the case.' "

In *Cramer v. United States,* 325 U.S. 1, 31 (1945), the Court said:

> "Since intent must be inferred from conduct of some sort, we think it is permissible to draw usual reasonable inferences as to intent from the overt acts. The law of treason, like the law of lesser crimes, assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect the result from his acts."

In *Morissette v. United States,* 342 U. S. 246, 249, 276, the lower Court instructed as a matter of law that the intent to steal was presumed from the isolated fact of the defendant taking the property. The Court stated, "whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the

surrounding circumstances." The last paragraph of Instruction 15 which reads, "In determining the issues as to intent, the jury are entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind." conforms to the standard required by the Supreme Court. *Bianchi v. United States,* 219 F. 2d 182, 194 (8th Cir. 1955).

In *Vallas v. State,* 288 N.W. 818 (Neb. 1939), the Court instructed that, ". . . the law warrants the presumption, or inference, that a person intends the results or consequences to follow an act that he intentionally commits which ordinarily do follow such act." Here, again, the Court was instructing as a matter of law when it said, "the law warrants the presumption", which was criticized in the *Morissette* case.

The Supreme Court of California follows the Nebraska rule when the charge is attempted murder, *People v. Snyder,* 104 P. 2d 639 (1940), but does not do so when the charge is murder. *People v. Cook,* 102 P. 2d 752, 757 (1940).

IV

SINCE THE DEFENDANT'S PROPOSED INSTRUCTIONS NOS. 3, 4, 5, 6, 11 AND 12 WERE COVERED IN THE COURT'S INSTRUCTIONS OR ARE NOT APPLICABLE TO THE FACTS IN THIS CASE NO PREJUDICIAL ERROR RESULTED.

Appellant alleges that the Court committed prejudicial error in refusing to give the above requested instructions. Trial counsel's only objection was, "I

except to the failure of the court to give those instructions requested by the defendant which were not given" (TR 493). This type of abortive objection was criticized in *Benatar v. United States,* 209 F. 2d 734, 743, 744 (9th Cir. 1954) where the Court stated, "In other words, he should have shown that the requested instruction was relevant, in the light of the evidence adduced in the present case." "It is true that a fundamental instruction should be given by the court, regardless of a proper request or objection. But an instruction that needs to be related to the facts at bar in order to be proper, is not a fundamental one." It is precisely to such special instructions, related to the particular facts of a given case, that Rule 30 of the Federal Rules of Criminal Procedure applies. If every failure to give such instruction is to constitute "plain error" so as not to require a proper request or objection, we might as well jettison Rule 30 altogether.

The appellant's specification of errors does not conform to Rule 18 (2)(d) of this Court. *Kobey v. United States,* 208 F. 2d 583, 587, 588 (9th Cir. 1953).

Since the Appellate Court often considers the requested instructions anyway, to resolve all doubt, appellee deems it advisable to comment on them.

Instruction No. 3 (TR 29) would not be applicable to the facts in the present case unless the Court first determined that the defendant remained at the scene of the homicide and did not attempt to flee or run away. Murray testified that the appellant left the bar after the shooting and was in his car out in the middle of the street. However, the appellant came back inside

the club after Murray told him, "You can probably get in a lot of trouble by taking off" (TR 122). If the jury found that the appellant left the club to call the police as he testified then they would under the Court's instructions consider what bearing it had on the appellant's intent.

This is a special instruction rather than a fundamental one; thus the Court was not required to give it even if properly stated.

Proposed instructions Nos. 4 and 5 (TR 29, 30), being special in nature, were adequately covered by the Court's general instruction on self-defense (TR 50, 51).

Proposed instruction No. 6 (TR 30, 31) was not a correct statement of the law applicable to the evidence in this case as previously argued in our brief on the Court's Instruction No. 12, because the appellant did not have a legal right to return to the barroom after being ejected unless he returned to disarm the deceased or make what in effect was a citizen's arrest. The cases cited by appellant in support of the proposed instruction are not in point.

Proposed instruction No. 11 (TR 33) was incorporated in the Court's Instruction No. 12, and the District Judge commented on the citizen's arrest as follows: "I think it does and I think the jury is well enough apprised without a lot of instruction about a citizen's arrest and the rights, because nearly every one, if not all, understood that; in answer to questioning, they said they understood the right of an individual to make an arrest (TR 489).

The judge also commented: "He said words that I construed as being tantamount to a citizen's arrest, and I am construing it favorable to the defendant, I believe." Trial counsel replied, "It is layman's language." A trial judge is never bound to instruct a jury in the exact language requested. *United States v. Walker,* 260 F. 2d 135, 152 (3rd Cir. 1958).

Proposed instruction No. 12 which reads, "A person, who has been forcibly deprived of personal property has a right to defend that property and demand its return", does not conform to any issue in the case. Trial counsel in his statement to the jury said, "He will tell you that he was humiliated, that he was angry, that he was determined to get the sum of two hundred dollars which he had left on the bar back . . ." (TR 277). The appellant did not testify that he came back to the Club to get his property.

Surely the statements of counsel cannot be the basis for giving an instruction. Furthermore, there is no evidence that the deceased ever took the money off the bar before or after the appellant left. Here the trial Court fulfilled its duty by instructing on the general principles of the law of the case and was not required to include in its instructions what is not the law of the case nor to outline all possible or probable factual situations.

Since the instructions considered together fairly informed the jury of the standards to apply to the homicide charge, the trial judge did not abuse his discretion in denying the motion for a new trial.

CONCLUSION.

For the reasons and the law set forth herein, appellee requests this Court to affirm the judgment of the Court below.

Dated, Fairbanks, Alaska,
March 14, 1960.

Respectfully submitted,

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